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No. 93-405

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DIGITAL EQUIPMENT CORPORATION,
Petitioner,
v.
DESKTOP DIRECT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did the court below err in concluding, contrary to recent decisions of the Second, Fifth, and Eleventh Circuits with which the court below expressly disagreed, that a decision setting aside a settlement agreement is not immediately appealable, and that a defendant who bargained for dismissal of the suit and avoidance of trial as part of the settlement may instead appeal the decision setting aside the settlement only after trial?

PARTIES TO THE PROCEEDING

Petitioner Digital Equipment Corporation was defendant-appellant below; respondent Desktop Direct, Inc., was plaintiff-appellee. Petitioner's Rule 29.1 statement appears at Pet. ii.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 993 F.2d 755 and is reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a. The orders of the United States District Court for the District of Utah are unreported and are reprinted at Pet. App. 11a, 12a.

JURISDICTION

Respondent Desktop Direct, Inc. initiated this case by filing a complaint against petitioner Digital Equipment Corporation in the United States District Court for the District of Utah on February 28, 1992. Jurisdiction was based on 28 U.S.C. §§ 1331 & 1338 and 15 U.S.C. § 1121. The parties settled the litigation and on March 25, 1992, respondent filed a notice of dismissal with the

district court pursuant to Fed. R. Civ. P. 41(a)(i). On September 17, 1992, respondent filed a motion to withdraw its notice of dismissal and to rescind the Settlement Agreement. The district court granted that motion on January 5, 1993. Pet. App. 12a.

Petitioner filed a notice of appeal on February 4, 1993, basing jurisdiction on the collateral order doctrine, and sought a stay of the district court order on March 29, 1993. On May 17, 1993, the court of appeals dismissed the appeal and denied the stay. *Id.* at 10a. On June 16, 1993, the court of appeals denied petitioner's timely petition for rehearing and suggestion for rehearing in banc. *Id.* at 14a.

The petition for a writ of certiorari was filed on September 13, 1993, together with an application for a stay. On October 4, 1993, this Court granted the stay, 114 S. Ct. 295, and on November 1, 1993, granted the petition for certiorari. *Id.* at 379. The jurisdiction of this Court to review the judgment below is based on 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

Section 1291 of Title 28, United States Code, provides in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Respondent Desktop Direct, Inc. ("Desktop") filed suit against petitioner Digital Equipment Corporation ("Digital") on February 28, 1992, in the United States District Court for the District of Utah. The complaint alleged a

violation of the Lanham Act, 15 U.S.C. § 1125(a), and related violations of Utah statutory and common law. Prior to service of the complaint and before any discovery, extensive settlement discussions between the parties led to a settlement agreement on March 25, 1992.

The agreement specified that "[c]ontemporaneous with the execution of this Settlement Agreement, Desktop shall execute [a] Notice of Dismissal * * *. Desktop shall file the executed Notice of Dismissal within three (3) business days of the execution of this Settlement Agreement." S.A. ¶ 6; J.A. II 3-4.[1] Without admitting fault or liability, Digital agreed to pay Desktop a significant sum to acquire the trademarks in question, and 15 times that amount "for dismissal of the * * * lawsuit and a waiver of all damages allegedly caused by Digital's use of [the pertinent trademarks]." S.A. ¶ 8; J.A. II 4. The payment to Desktop was to be held in escrow until Desktop "confirms that a Notice of Dismissal * * * has been filed with the United States District Court for the District of Utah and dismissal has been effected." *Id.* Desktop filed the notice of dismissal the same day the agreement was executed.

Nearly six months later, on September 17, 1992, Desktop filed a motion in the district court requesting that the court vacate the dismissal and rescind the Settlement Agreement on grounds of fraud. Desktop explained that it had retained new attorneys and now believed that it had been induced to settle through Digital's alleged fraudulent misrepresentations of fact. Desktop claimed that, during settlement negotiations, Digital had led Desktop to believe that Digital had acted innocently and without knowledge in adopting the allegedly infringing trade-

[1] Pursuant to a confidentiality provision, the Settlement Agreement is in the record under seal. Citations to "S.A." are to the Settlement Agreement as it appears in the record. Parallel citations to "J.A. II" are to the sealed volume of the Joint Appendix containing the Settlement Agreement. Digital has filed a Motion for Leave to File Joint Appendix Under Seal in order that the sealed Agreement would be conveniently available for the Court.

mark. Desktop now asserted that such representations were untrue. Two weeks later, Desktop "correct[ed]" its motion. It acknowledged that "[t]o the extent that Plaintiff has asserted that [Digital] adopted the Desktop Direct name in a knowing manner, Plaintiff at this time has no direct proof." Supplemental Memorandum in Support of Motion of Plaintiff to Withdraw Notice of Dismissal, at 2. Desktop explained that any suggestions it had made that Digital knowingly adopted Desktop's trademark should be read to mean instead that Digital proceeded knowingly in using the trademark. *Id.*

On January 5, 1993, over Digital's opposition, the district court granted Desktop's motion to withdraw the dismissal and rescind the Settlement Agreement. The court "conclude[d] that a fact finder could determine that defendant failed to disclose material facts to plaintiff during settlement negotiations which would have resulted in rejection of the settlement offer by the plaintiff." Pet. App. 13a. Digital filed a timely notice of appeal to the Court of Appeals for the Tenth Circuit on February 4, 1993.

On February 26, 1993, the court of appeals requested briefing on the question whether it had jurisdiction over Digital's appeal. Digital explained that the court had jurisdiction under the collateral order doctrine recognized in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), because the district court decision conclusively determined the disputed question, resolved an important issue completely separate from the merits of the action, and would be effectively unreviewable if Digital were required to wait until after the trial to appeal.

On March 29, 1993, Digital sought a stay from the court of appeals of litigation proceedings in the district court.[2] On May 17, 1993, the Tenth Circuit denied the stay and dismissed Digital's appeal, concluding that it lacked appellate jurisdiction. Pet. App. 1a.

[2] The district court had previously denied a stay on March 15, 1993. Pet. App. 11a.

The court of appeals began its analysis by acknowledging that the Second, Fifth, and Eleventh Circuits had held that district court orders of the sort at issue here were appealable under the collateral order doctrine. *Id.* at 3a. *See Janneh* v. *GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990); *Grillet* v. *Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991); *Forbus* v. *Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992). As the Tenth Circuit stated, however, "[w]ith due respect to our sister circuits, we disagree." Pet. App. 3a.

The court of appeals noted that "[t]o fall within the *Cohen* exception, an order must satisfy at least three conditions: It must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Id.* (quoting *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. 495, 498 (1989)). The court of appeals agreed with Digital that the first requirement was met because the district court had rescinded the Settlement Agreement and withdrawn the notice of dismissal, conclusively determining that the revived case would go forward. Pet. App. 4a. The court further agreed that the complaint of misrepresentation during settlement was separate from the merits of Desktop's underlying trademark claim, relying on this Court's decision in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985) (question of defendant's qualified immunity "conceptually distinct" from merits and appealable under collateral order doctrine). Pet. App. 4a-5a.

The Tenth Circuit, however, found "[t]he question of the 'importance' of the issue" to be "more difficult." *Id.* According to the court below, the "importance" issue was "intertwined with the third *Cohen* requirement that the issue be effectively unreviewable on appeal from a final judgment." *Id.* The court noted that "[o]nly by characterizing [Digital's] expectation that no trial will occur

after entering a settlement agreement as 'a right not to be tried' can we say that it is unreviewable after a final judgment." *Id.* The court did not then go on to consider whether the Settlement Agreement in fact conferred upon Digital a right not to be tried. Instead, applying its view that the "importance" and "effectively unreviewable" elements of the *Cohen* test were "intertwined," the Tenth Circuit ruled as a matter of law that rights conferred by private settlement contracts were not " 'important' enough to fall within the narrow confines of the *Cohen* doctrine." *Id.* at 6a, 10a. According to the court below, "encouragement of out-of-court settlements is desirable," but it is "too expansive a reading of the 'right not to go to trial' in the context of the *Cohen* doctrine" to base that right on a settlement agreement. *Id.* at 6a, 9a.

Digital filed a timely petition for rehearing and suggestion for rehearing in banc, which were denied on June 16, 1993. *Id.* at 14a. On September 13, 1993, Digital filed a petition for a writ of certiorari, together with an application for a stay. Justice Thomas referred the stay application to the Court, which granted the stay on October 4, 1993. 114 S. Ct. 295. The petition was granted on November 1, 1993. *Id.* at 379.

SUMMARY OF ARGUMENT

Section 1291 of the Judicial Code, 28 U.S.C. § 1291, provides that the courts of appeals shall have jurisdiction over appeals from final decisions of the district courts. This Court has interpreted Section 1291 to permit appeal of certain district court orders that do not terminate proceedings in the district court, but are nonetheless considered "final" for purposes of the statute. Such orders are appealable under the collateral order or *Cohen* doctrine if they "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).

The Tenth Circuit below correctly decided that the district court order rescinding the Settlement Agreement and reinstating the litigation conclusively determined the question of Digital's right to avoid trial on Desktop's claims. Pet. App. 4a. The court of appeals also correctly decided that the issue of the validity of the Settlement Agreement was completely separate from the underlying merits of Desktop's trademark claims. *Id.* at 4a-5a. The court below erred, however, in both its approach and conclusion, in deciding that Digital's right to avoid trial should not be deemed such a right "in the context of the *Cohen* doctrine," because it was not "important enough." *Id.* at 8a-9a.

Whether the right at issue is a right to avoid litigation and whether that right is "important enough" are distinct questions that should be analyzed separately. Here it is clear that the right Digital seeks to vindicate on appeal is the right to avoid litigation. The Settlement Agreement was expressly conditioned on dismissal of Desktop's pending suit, and conferred on Digital not only a defense in future litigation but an immunity from suit on Desktop's claims. Because the right at issue is a right to avoid trial, it will be irretrievably lost if Digital must await the end of trial to appeal the district court's denial of that right. Digital's right is therefore a right to avoid trial that is "effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand*, 437 U.S. at 468—"the heart of the issue" under the collateral order doctrine. *Mitchell* v. *Forsyth*, 472 U.S. at 525.

The Tenth Circuit below nonetheless refused to find appealability under *Cohen* because of its view that rights to avoid litigation secured by settlement agreements are not " 'important' enough", and that allowing interlocutory appeal of such orders does not serve a "compelling public policy." Pet. App. 6a. The court was wrong in its policy assessment. This Court, other courts, and Congress have long recognized the critical role that settlements play in

the administration of justice in the federal courts. The right to avoid trial is the key consideration provided by a plaintiff in a settlement agreement. If that right cannot be vindicated until after the trial has taken place, the binding and final effect of settlement agreements will be seriously eroded.

Quite apart from the foregoing, the Tenth Circuit erred in undertaking its broad "public policy" inquiry in the first place. The issue, after all, is interpretation of 28 U.S.C. § 1291, and while this Court has adopted a "practical" construction of that provision, *Cohen,* 337 U.S. at 546, it has never arrogated to itself the authority to decide what types of cases may be appealed as a matter of "public policy" and what types may not. That is plainly a legislative determination for Congress. Instead, this Court has developed and applied a more focused test, looking to the central concern of Section 1291—finality—by inquiring whether the district court has made a conclusive determination, separate from the merits, of an issue effectively unreviewable after trial. The various formulations of this test have, to be sure, indicated that the issue should be "important" in some sense, but the Court has never viewed "importance" in the broad public policy sense embraced by the Tenth Circuit, and could not do so without contravening basic notions of the proper roles of Congress and the Federal Courts in defining jurisdiction.

In fact, in more recent cases, the Court has explained that "the heart of the issue" under the collateral order doctrine is whether the right in question is "an entitlement not to stand trial under certain circumstances." *Mitchell* v. *Forsyth,* 472 U.S. at 525. Since *Mitchell,* every case in which this Court has upheld appealability under *Cohen* has involved a right not to go to trial. And in every case since *Mitchell* denying appealability, the right at issue was *not* a right to avoid trial. That inquiry—and not some roving public policy judgment on which types of cases are "important enough" to be appealed and which are not—

is the proper inquiry under this Court's practical construction of Section 1291.

The source of the particular right to avoid litigation has no logical pertinence to an assessment of the finality of a decision under *Cohen* and Section 1291. This Court has found appealability of interlocutory orders where the right at issue was based on the Constitution, federal statute, state statute, rules of procedure, or common law. Digital's right under the Settlement Agreement is a legally enforceable right. Nothing in Section 1291—the statutory source of the collateral order doctrine—provides any basis for determining that certain types of rights to avoid trial may be vindicated on appeal under *Cohen* while other types may not.

ARGUMENT

AN ORDER SETTING ASIDE A SETTLEMENT AGREEMENT AND REINSTATING LITIGATION IS IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE

This Court has long recognized that a district court order, although not resolving all issues in the litigation, may be appealed under the authority of 28 U.S.C. § 1291 when it "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Indus. Loan Corp.,* 337 U.S. at 546. Indeed, by the time *Cohen* was decided in 1949, Justice Jackson, writing for the Court, was able to observe that "[t]he Court has long given [Section 1291] [a] practical rather than a technical construction."[3] As he would later ob-

[3] *Cohen,* 337 U.S. at 546 (citing *Bank of Columbia* v. *Sweeny,* 26 U.S. (1 Pet.) 567, 569 (1828); *United States* v. *River Rouge Improvement Co.,* 269 U.S. 411, 414 (1926); *Cobbledick* v. *United States,* 309 U.S. 323, 328 (1940)). *See also Firestone Tire & Rubber*

serve, "[i]t is a final *decision* that Congress has made reviewable" in Section 1291, not final *judgments*. "While a final judgment is nearly always a final decision, there are instances in which a final decision is not a final judgment." *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring).

Cohen permitted the collateral appeal of a district court order refusing to apply a New Jersey statute requiring that plaintiffs in a stockholder derivative action post security for fees and expenses for which they would be liable if they lost. Later cases applying *Cohen* permitted immediate appeal of orders refusing to reduce excessive bail, *Stack* v. *Boyle*, *supra*, limiting a suit to Jones Act claims and denying the right of certain parties to pursue recovery, *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), allocating notice costs in a class action, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), and denying a motion to dismiss on double jeopardy grounds, *Abney* v. *United States*, 431 U.S. 651 (1977).

More recently, the Court has determined the appealability of collateral orders by using a three-part test based on its early opinions and articulated in *Coopers & Lybrand* v. *Livesay*: "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U.S. at 468. Under this test, the Court has determined that it is appropriate to review on a collateral basis orders rejecting a defense under the Speech or Debate Clause, *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), granting a stay of federal litigation under the doctrine of *Colorado River Water*

Co. v. *Risjord*, 449 U.S. 368, 375 (1981) (citing *River Rouge*; *Bronson* v. *Railroad Co.*, 67 U.S. (2 Black) 524, 530-531 (1863); *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201, 203 (1848); *Whiting* v. *Bank of the United States*, 38 U.S. (13 Pet.) 6, 15 (1839)).

Conservation District v. *United States*, 424 U.S. 800 (1976), *Moses H. Cone Memorial Hosp.* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), denying a former public official qualified immunity, *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985), and denying a motion to dismiss a lawsuit on Eleventh Amendment grounds. *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993).

The Tenth Circuit below recognized that the district court's decision conclusively resolved the disputed question,[4] and that the question was completely separate from the merits of the action.[5] This case presents the question

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[4] The court of appeals found that the district court's decision setting aside the Settlement Agreement—although "somewhat cryptic" in its reasoning—was nevertheless " 'the final word on the subject addressed.' " Pet. App. 4a (quoting *Moses H. Cone Memorial Hosp.* v. *Mercury Construction Corp.*, 460 U.S. at 12-13 n.14). The district court granted Desktop's motion to withdraw the notice of dismissal and to rescind the Settlement Agreement; having done so, it conclusively revived—so far as the district court was concerned—the suit that had been extinguished by the Settlement Agreement. Pet. App. 12a-13a. At that point, because " '[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred,' it is apparent that '*Cohen*'s threshold requirement of a fully consummated decision is satisfied' * * *." *Mitchell* v. *Forsyth*, 472 U.S. at 527 (quoting *Abney* v. *United States*, 431 U.S. at 659).

[5] The Tenth Circuit found that Desktop's effort to rescind the Settlement Agreement was separate from the merits of the action because "the complaint of misrepresentation during settlement negotiations is 'conceptually distinct' from the trademark violation charges." Pet. App. 4a-5a. The issue Digital seeks to appeal therefore does not involve "considerations that are 'enmeshed in the factual and legal issues comprising' " Desktop's trademark claim. *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 469 (quoting *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963)). Desktop presumably believed its underlying claim existed long before any settlement discussions took place, when it filed its initial complaint. Whatever Digital said or did not say during settlement negotiations

whether orders setting aside fully executed settlement agreements, and thereby reviving litigation that had been dismissed with prejudice, meet the additional requirements established by this Court to be among the class of orders that can be appealed immediately. As the Second, Fifth, and Eleventh Circuits have recognized, the answer is yes. The collateral order doctrine permits immediate appeal of an order voiding a settlement agreement that terminated litigation between the parties and secured for the defendant the right not to face trial. The Tenth Circuit's contrary decision rests on a misapplication of this Court's decisions and should be reversed.

A. The District Court's Order Rejecting Digital's Right Not To Go To Trial Is Unreviewable After Trial

By their very nature, settlement agreements secure for a defendant the right not to face trial on claims brought by the plaintiff. *See United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971) (Through settlement "[t]he parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation"). In the typical settlement—such as the one at issue here—a defendant pays the plaintiff an agreed sum in return for the plaintiff's dismissal of a pending lawsuit and agreement to forego further litigation of asserted claims. Because an "essential aspect of the claim" presented by Digital under the Settlement Agreement is therefore "the right to be free of the burdens of trial," *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 525

simply has no bearing on the validity of the prior allegations in Desktop's complaint.

A party claiming it would not have settled on the terms agreed to had it known certain additional facts, and that some alleged misrepresentation meets the stringent legal standard for upsetting settlements, has not—even if successful in setting aside the settlement agreement—established its entitlement to prevail on its underlying claim. In the class of cases at issue here, the issues on appeal will be separate from the merits of the underlying dispute.

(1988), the district court's decision rejecting that claim is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468.

In this case, there can be no doubt that Digital entered into the Settlement Agreement to avoid the costs and burdens of preparing for and going to trial. The agreement, of course, specifically obligated Desktop to execute and file a notice of dismissal, S.A. ¶ 6; J.A. II 3-4, and conditioned the payment of funds on notification that "dismissal has been effected." S.A. ¶ 8; J.A. II 4. Desktop itself has recognized that "[i]n the settlement agreement * * *, one of the principal items of consideration was the agreement by Plaintiff to file a Notice of Dismissal." Memorandum in Support of Motion of Plaintiff to Withdraw Notice of Dismissal, at 19. Indeed, the parties agreed that some 94 percent of the settlement amount was paid to Desktop "for the dismissal of the * * * lawsuit and a waiver of all damages * * *." S.A. ¶ 8; J.A. II 4. The agreement was entered into prior to service of the complaint and before any costly and time-consuming discovery, precisely because it was intended to avoid the burdens of trial and preparation for trial.

But only an ill-advised defendant would agree to settle a claim based on a promise simply to *end* litigation. Instead, defendants regularly insist that agreements to settle litigation protect against the possibility of future litigation; there is very little value in a settlement that does not secure this relief for a defendant. Such relief was plainly part of the bargain between Digital and Desktop. The agreed-upon notice of dismissal specified that the dismissal was "with prejudice" to the filing of a new action,[6] and the Settlement Agreement contained a release typical

[6] *See* 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice*, ¶ 41.05[2], at 41-71 (1993) (dismissal with prejudice "operates to *bar another action* on the claim that was dismissed with prejudice") (emphasis added).

in its sweeping language, scope, and effect.[7] The release specified that Digital and Desktop "hereby fully and forever remise, release and discharge the other * * * from any and all claims, * * * actions, suits, causes of action, * * * of whatsoever kind or nature, in law, equity or otherwise." S.A. ¶ 7; J.A. II 4. This language establishes that the right to avoid future litigation was an explicit and essential element of the agreement between Digital and Desktop.

Without quite endorsing the argument itself, Desktop has suggested that "[i]t can be argued" that the Settlement Agreement "merely provides a defense to liability rather than creates a 'right not to go to trial.'" Opp. 4 n.4. That suggestion is plainly refuted by the operative language of the agreement. The agreement does provide a release from "any and all * * * liabilities" in connection with Digital's alleged use of the Desktop trademark, but it does more—it also provides a release from "any and all claims, * * * actions, *suits*, causes of action, * * * of whatsoever kind or nature, in law, equity or otherwise." S.A. ¶ 7; J.A. II 4 (emphasis added). This

[7] The release provided:

> Desktop and Digital, for and on behalf of themselves, and their predecessors, successors, and assigns, hereby *fully and forever remise, release and discharge* the other, and each and all of its subsidiary and affiliated corporations, companies and divisions, their predecessors, successors and assigns, and their respective directors, stockholders, officers, employees and agents of, and *from any and all claims*, demands, agreements, covenants, *actions, suits, causes of action*, obligations, controversies, costs, expenses, accounts, damages, judgments, losses and liabilities, of whatsoever kind or nature, *in law, equity or otherwise*, whether known or unknown, whether or not concealed or hidden, which against them or any of them it has had, may have had, or now has, or which any of its predecessors, successors, or assigns hereafter can, shall or may have for or by reason of Desktop's use of DESKTOP DIRECT alone or in any combination and Digital's use of DESKTOP DIRECT from DIGITAL alone or in any combination. [S.A. ¶ 7; J.A. II 4 (emphasis added).]

additional language would be wholly unnecessary if the agreement did not secure a right to avoid trial; a simple release from all claims or liabilities would suffice if Digital were only seeking a valid defense in future litigation. But Digital demanded and received the legally enforceable right not to face future litigation, and it is that right that it seeks to vindicate by its appeal under the *Cohen* doctrine.

Under this Court's decisions applying *Cohen*, this characteristic of the claim Digital raises here—the right not to face trial—is "the heart of the issue." *Mitchell* v. *Forsyth*, 472 U.S. at 525. When considering the appealability of a decision prior to final judgment, this Court focuses on whether the right sought to be vindicated "is in fact an entitlement not to stand trial under certain circumstances." *Id.* *See also Midland Asphalt Corp.* v. *United States*, 489 U.S. at 801 (1989); *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. at 498-499, 501; *Van Cauwenberghe* v. *Biard*, 486 U.S. at 524. As this Court explained in *Lauro Lines*, a claim that involves an "entitlement to avoid suit is different in kind" from other claims the Court has found not immediately appealable. 490 U.S. at 501.

The distinction is grounded in the purpose served by the general rule of finality. As the Court explained in *Cohen*, 337 U.S. at 546, "[t]he purpose [of the finality requirement] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." In cases where "an essential aspect of the claim is the right to be free from the burdens of trial," *Van Cauwenberghe*, 486 U.S. at 525, the matter may *not* be effectively reviewed after final judgment, because the right is "essentially destroyed if its vindication must be postponed until trial is completed." *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. at 495. *See Midland Asphalt Corp.* v. *United States*, 489 U.S. at 800-801 ("It is true that deprivation of the right not

to be tried satisfies the *Coopers & Lybrand* requirement of being 'effectively unreviewable on appeal from a final judgment' "). But where the claim is simply that the putative appellant has a right to prevail or a right to certain attributes of trial that is being restricted or denied by the district court's decision, those rights can be effectively, if not completely, vindicated after final judgment.

Thus, for example, a district court order rejecting a claim that the Double Jeopardy Clause precludes trial is immediately appealable even though it is interlocutory, because the double jeopardy claim is a claim to be free from a second trial, not simply a claim that the defendant cannot be convicted. Requiring that a defendant await a final judgment to raise the double jeopardy claim would protect the defendant against a second conviction, but would not vindicate his interest in avoiding "the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." *Abney* v. *United States*, 431 U.S. at 661.

By the same token, a district court order rejecting a claim of qualified immunity from suit is also immediately appealable under *Cohen*. Requiring a public official to await a final judgment to appeal such an order would protect the official's interest in not being found liable for good faith acts within the scope of his official responsibility, but not his interest in avoiding the burdens of trial itself—an interest at the heart of the claim of immunity. *See Mitchell* v. *Forsyth*, 472 U.S. at 526. That interest is "effectively lost if a case is erroneously permitted to go to trial," *id.*, and accordingly an interlocutory appeal is permitted. *Id.* at 526-527. *See also Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982).

Most recently, the Court held that a district court order denying an agency's motion to dismiss a lawsuit on Eleventh Amendment grounds was immediately appealable under the collateral order doctrine. *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, *supra*.

The Court analogized such a case to the public official's immunity in *Mitchell*, noting that the claimed right was effectively unreviewable on appeal from a final judgment, because "the value to the States of their Eleventh Amendment immunity * * * is for the most part lost as litigation proceeds past motion practice." 113 S. Ct. at 688.

The same analysis applies here. Although the court of appeals could rule in Digital's favor on the settlement issue after trial—just as an appellate court could rule in favor of a defendant on a double jeopardy claim or a public official or state on an immunity claim after trial—such a ruling would not vindicate Digital's right under the agreement to avoid trial. Digital's claim is therefore "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468.[8]

In contrast, in several leading cases in which this Court has concluded that a district court order was not appealable under *Cohen*, it has been because the Court found that the right sought to be vindicated on appeal was not a right to avoid trial. For example, in *Midland Asphalt*, the Court determined that a district court order denying a motion to dismiss an indictment because of a violation of Fed. R. Crim. P. 6(e)(2)—which prohibits disclosure by government attorneys of grand jury matters—was not appealable under *Cohen*. The Court explained that nothing in Rule 6(e) suggests that it conferred a right to avoid trial. 489 U.S. at 802. *See also Flanagan* v. *United States*, 465 U.S. 259, 266-267 (1984) (denying appeal-

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[8] Desktop's only answer in its Opposition to the point that failure to allow immediate appeal would irreparably deprive Digital of its right to avoid trial was the glib one that Digital could avoid trial by defaulting. Opp. at 6. This argument proves far too much, for it would defeat the collateral order doctrine in all circumstances. The same argument could have been made with respect to the defendant with a double jeopardy claim, the public official with a qualified immunity claim, or a state agency with an Eleventh Amendment immunity claim—all situations in which this Court has upheld appeals under the collateral order doctrine.

ability under *Cohen* because "it cannot be said that the right petitioners assert * * * is a right not to be tried"). Here, in contrast, the "essence" of Digital's right under the Settlement Agreement was the right to avoid trial. The *Midland* Court found nothing in "[t]he text" of Rule 6(e) to indicate that it conferred a right to avoid trial, 489 U.S. at 802, but here the text of the Settlement Agreement plainly states that avoidance of trial is precisely what Digital bargained and paid for.

United States v. *MacDonald*, 435 U.S. 850 (1978), held that denial of a motion to dismiss on speedy trial grounds was not appealable under *Cohen*. The Court reasoned that it was "the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial," and that therefore the speedy trial right was not a right to avoid trial. "Proceeding with the trial does not cause or compound the deprivation already suffered." *Id.* at 861. Again, the opposite is true here. Digital's bargained-for right is the right not to be required to go to trial on Desktop's complaint—a right that will be lost if Digital must go to trial before it can appeal.[9]

[9] In relying on *Midland Asphalt* and *MacDonald*, the court below failed to appreciate two key distinctions noted several times by this Court. First, *Midland Asphalt* and *MacDonald* were criminal cases, and this Court has been particularly reluctant to apply the collateral order doctrine in the criminal context. As the Court explained in *MacDonald*, "[t]he rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law.'" 435 U.S. at 853-854 (quoting *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940)). *See also Midland Asphalt*, 489 U.S. at 799 ("We have interpreted the collateral order exception 'with the utmost strictness' in criminal cases") (quoting *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984)); *Abney* v. *United States*, 431 U.S. at 657. The Tenth Circuit below noted that *Midland Asphalt* and *MacDonald* were criminal cases, but then stated that they demonstrated "the strict reading of the 'right not to go to trial' necessary *in cases like this one*," App. 9a (emphasis added), without any mention of the significance of the criminal/civil distinction noted in both the *Midland Asphalt* and *MacDonald* opinions themselves. Second, and more significantly, the court below failed to recognize that the Court's holdings in *Midland Asphalt* and *MacDonald* were that those cases did not involve the "right not to go to trial" at all, while this case indisputably does.

The Tenth Circuit also erred in relying on this Court's decision in *Van Cauwenberghe* v. *Biard*, *supra*. In that case this Court held that the collateral order doctrine did not extend to a district court order denying a motion to dismiss on the ground of specialty under an extradition treaty. The Supreme Court explained that the principle of specialty was basically a matter of treaty obligation between two sovereigns, rather than conferral of a right on the individual to be free from civil trial. 486 U.S. at 525. Significantly, the Court noted that its decision was based on "the absence of an explicit agreement obligating the United States to protect the extradited person from the burdens of a civil suit." *Id.* & n.4. Here, of course, there *was* an explicit agreement between the contracting parties to protect Digital "from the burdens of a civil suit." That was the essence of the Settlement Agreement.[10]

Perhaps the most surprising error of the court below was its reliance on this Court's decision in *Lauro Lines*. There the Court held that a district court order refusing to dismiss a suit on the ground that it violated a forum-selection provision was not immediately appealable under the collateral order doctrine. 490 U.S. at 501. The Tenth Circuit below stated that "[w]e do not see how a private settlement contract is significantly different from the contracted forum selection clause the Supreme Court refused to enforce through interlocutory appeal in *Lauro Lines*."

[10] The Court in *Van Cauwenberghe* also held that denial of a motion to dismiss on *forum non conveniens* grounds was not appealable under the collateral order doctrine. 486 U.S. at 527-530. The Court reasoned that the *forum non conveniens* issue was not "completely separate from the merits of the action." *See id.* at 527 (quoting *Coopers & Lybrand*, 437 U.S. at 468). The Tenth Circuit correctly found that requirement satisfied in the present case. Pet. App. 4a-5a; *see supra* at 11-12 n.5.

Pet. App. 10a. *See also Transtech Indus., Inc.* v. *A & Z Septic Clean*, 5 F.3d 51, 58 (3d Cir. 1993). This Court itself, however, recognized the key distinction in its opinion, explaining that "an entitlement to avoid suit is different in kind from an entitlement to be sued only in a particular forum." 490 U.S. at 501. Here Digital's entitlement under the Settlement Agreement is "to avoid suit"—an entitlement "different in kind" from that considered in *Lauro Lines*. *See Janneh* v. *GAF Corp.*, 887 F.2d at 436 (distinguishing *Lauro Lines* on that basis).

The court below noted this Court's admonition "not to play word games with the concept of a right not to be tried." Pet. App. 9a (quoting *Midland Asphalt*, 489 U.S. at 801). The concern is that any right not to be convicted or found liable could be characterized as a "right not to be tried," extending the collateral order exception beyond reasonable bounds. Thus, for example, a defendant with a valid defense to a tort claim could contend that he has a right not to be tried on that claim—because he is innocent of the charge—and that he should therefore be able to appeal an interlocutory order rejecting the defense. That is plainly not the case here. As explained above, Digital's right under the express terms of the Settlement Agreement is not simply a defense to liability, but a right not to be tried at all—a right that will be irretrievably lost if Digital must wait until after trial to appeal.

The Second, Fifth, and Eleventh Circuits have recognized that settlement agreements typically secure a right to avoid trial. Accordingly, those courts have held that district court orders vacating such agreements and allowing litigation to proceed are effectively unreviewable on appeal from a judgment after trial. *See Janneh* v. *GAF Corp.*, 887 F.2d at 436 (defendant "bargained for and obtained the right to avoid a trial by agreeing to a settlement"); *Grillet* v. *Sears, Roebuck & Co.*, 927 F.2d at 220 ("The essence of the claimed right is the right not to go to trial at all"); *Forbus* v. *Sears, Roebuck & Co.*, 958 F.2d at 1040 ("The essence of [the employer's] claim

* * * is that it contracted for the right to avoid being sued by [its employees]"). *See also Chaput* v. *Unisys Corp.*, 964 F.2d 1299, 1301 (2d Cir. 1992) (explaining that ground on which orders refusing to enforce agreements not to litigate are appealable "is analogous to that applied to claims of double jeopardy or qualified immunity. * * * In those cases, the claim asserted is not only a defense to liability but also an immunity from trial").

Digital bargained for and secured an explicit agreement that it would not face trial on Desktop's claims. It is that right Digital seeks to vindicate by appealing *before* the very trial it bargained to avoid has taken place. As in *Cohen*, when final judgment is issued after trial on the merits, "it will be too late effectively to review the present order," and the rights conferred by the Settlement Agreement "will have been lost * * *." 337 U.S. at 546.

B. The Right Not To Go To Trial Under A Settlement Agreement Is Important Enough To Support Appeal Under *Cohen*

The Tenth Circuit did not disagree with the proposition that the Settlement Agreement, as a matter of fact, conferred on Digital the right to avoid litigation on Desktop's claims. Indeed, the court below acknowledged Digital's expectation under the Settlement Agreement "that no trial will occur." Pet. App. 5a. The court nonetheless ruled that Digital's right under the settlement should not be deemed a " 'right not to go to trial' in the context of the *Cohen* doctrine," *id.* at 9a, because the right was not " 'important' enough to fall within the narrow confines of the *Cohen* doctrine." *Id.* at 6a.

The Tenth Circuit consciously "intertwined" the question whether Digital's claimed right was effectively unreviewable with the question of its "importance," *id.* at 5a, but the two issues are distinct and should be analyzed separately. The Settlement Agreement either did or did not confer a right to avoid litigation; how "important" a particular court may regard that right cannot alter that

determination. If a court, as the Tenth Circuit did here, declines to allow appeal under *Cohen* because the right to avoid litigation is in its view not "important enough," it only obfuscates the basis for decision for the court then to conclude that the right at issue is therefore not a right to avoid litigation at all "in the context of the *Cohen* doctrine." *Id.* at 9a.

The point is significant because, as noted, this Court has repeatedly focused on whether the right in question is in fact a right not to stand trial as "the heart of the issue" under *Cohen*. *Mitchell* v. *Forsyth*, 472 U.S. at 525. A decision not to apply *Cohen* because the right is not "important enough" must stand or fall on that ground, and cannot be reconciled with this Court's precedents simply by the *ipse dixit* of characterizing an "unimportant" right to avoid litigation as in fact not a right to avoid litigation after all. Having established in Part A that what is at issue here is a right to avoid litigation that would be irretrievably lost if Digital had to await the end of litigation to vindicate that right, we turn now to the Tenth Circuit's conclusion that this right was not "important enough" to come within the jurisdiction of the court of appeals under *Cohen*.

1. *Permitting Immediate Appeal Of Decisions Declining To Enforce Agreements Not To Litigate Serves Compelling Public Policies*

The Tenth Circuit seriously erred in judging the importance of the public policy that would be vindicated by permitting appeal here. From early pronouncements to the current day, this Court has repeatedly, and in a variety of contexts, affirmed the strong public policy supporting the negotiated resolution of disputes. "[S]ettlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored." *St. Louis Min. & Mill. Co.* v. *Montana Mining Co.*, 171 U.S. 650, 656 (1898). *See Williams* v. *First National Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts"). Thus, where the parties have negotiated and compromised a disputed claim, "such a settlement ought not to be overthrown, even if the court should now be of the opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained." *Hennessy* v. *Bacon*, 137 U.S. 78, 85 (1890).

Indeed, as the Court recently noted, "[a] settlement is not irrational simply because it turns out *in retrospect* to have been a bad settlement." *Airline Pilots Ass'n Int'l* v. *O'Neill*, 499 U.S. 65, 79 (1991). The Court has further warned against judicial second-guessing of the "legal climate that confronted the negotiators at the time the decision was made," *id.* at 78, and has reversed decisions where the lower courts failed to give proper weight to the "strong policy" favoring the non-judicial settlement of disputes. *Id. Cf. Carson* v. *American Brands, Inc.*, 450 U.S. 79, 89 (1981) (holding that the district court's refusal to approve a consent decree deprived the parties of the "benefits of the settlement agreement they negotiated").

Prior to the decision of the Tenth Circuit below, the courts of appeals had uniformly recognized the overwhelming importance of settlement agreements to our judicial system. As Judge Friendly noted, "[t]here are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation." *Weinberger* v. *Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). *See, e.g., Janneh*, 887 F.2d at 435 ("bargained-for right to avoid trial by enforcing [a] settlement agreement * * * implicates our nation's strong judicial and public policies favoring out-of-court settlement"); *American Sec. Vanlines, Inc.* v. *Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986) ("[f]ew public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute") (quoting district court decision); *Hemstreet* v. *Spiegel, Inc.*, 851 F.2d 348, 350 (Fed. Cir. 1988) ("The law strongly favors settlement of litigation, and there is a com-

pelling public interest and policy in upholding and enforcing settlement agreements voluntarily entered into").[11]

As the *Janneh* court summed up:

> Litigants, courts, and Congress view settlement as a positive force, indispensable to judicial administration. Foregoing formal courtroom procedures, including discovery, trial, briefs and arguments, brings substantial benefits to the parties. The costs of litigation are reduced and crowded dockets are relieved. [887 F.2d at 435].

The importance of settlement to the judicial process has increased as dockets have become more crowded. Between 1958 and 1988, the number of cases filed in the federal district courts tripled. *See Report of the Federal Courts Study Committee* 5 (1990). During roughly the same period, from 1940 to 1985, the percentage of cases reaching trial in the federal courts dropped from about 15 percent to about 5 percent. *See* Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3, 8 (1986). Settlement plainly accounts for a great number of the cases terminated prior to trial in the federal courts. The strong public policy in favor of settlement is grounded in the reality that even a modest increase in the number of cases going to trial would strain already over-burdened judicial resources and further frustrate dispute resolution.

The public policy in favor of settlements is reflected in rules designed to encourage settlement agreements. Federal Rule of Civil Procedure 68, concerning offers of

[11] The courts of appeals have repeated this assessment on numerous occasions. *See, e.g., Justine Realty Co.* v. *American Nat'l Can Co.*, 976 F.2d 385, 391 (8th Cir. 1992) ("Settlement agreements are generally encouraged and favored by the courts"); *In re Smith*, 926 F.2d 1027, 1029 (11th Cir. 1991) ("Settlement is generally favored because it conserves scarce judicial resources"); *Bass* v. *Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1164 (5th Cir. 1985) ("public policy favors voluntary settlements which obviate the need for expensive and time-consuming litigation").

judgment, is expressly designed "to encourage settlement and avoid protracted litigation." Advisory Committee Note to 1946 Amendment to Rule 68. *See Marek* v. *Chesny*, 473 U.S. 1, 5 (1985) ("The plain purpose of Rule 68 is to encourage settlements and avoid litigation"). The strong public policy in favor of settlement underlies Federal Rule of Evidence 408, regarding admissibility of offers to settle litigation. *See* S. Rep. No. 1277, 93d Cong., 2d Sess. 10 (1974) ("The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible"). In passing the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471-482), Congress encouraged federal district courts to examine the advisability of mechanisms to facilitate settlement. It required each court, in formulating a "civil justice expense and delay reduction plan," to consider increased use of settlement conferences and alternative dispute resolution procedures. *See, e.g.*, 28 U.S.C. § 473(a)(3)(A), (b)(2) & (b)(4).

Settlement not only serves to reduce crowded dockets and minimize litigation costs, but also to permit the ordering of business and personal relationships with a confidence that past disputes, once settled, will remain in a state of repose. Courts have recognized their "obligation to enforce settlement agreements and foster the repose of settled litigation." *Interspiro USA, Inc.* v. *Figgie International, Inc.*, 815 F. Supp. 1488, 1521 (D.Del. 1993).

The value of settlements to litigants and the judicial system depends, of course, on their binding effect. There would be "absolutely no incentive to settle with the plaintiff [where] a settlement would be accompanied by no repose." *In re National Smelting of New Jersey, Inc.*, 722 F.Supp. 152, 178 (D.N.J. 1989). For this reason, courts have routinely refused to reopen cases that have settled except in extraordinary circumstances. Settlement agreements are contractual arrangements to avoid litigation. As such, "a litigant can no more repudiate a compromise

agreement than he could disown any other binding contractual relationship." *Dacanay* v. *Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978). *Accord Bostick Foundry Co.* v. *Lindberg*, 797 F.2d 280, 283 (6th Cir. 1986) ("Once concluded, a settlement agreement is as binding, conclusive and final as if it had been incorporated into a judgment and the actual merits of the antecedent claims will not thereafter be examined"), *cert. denied*, 479 U.S. 1066 (1987). In short, public policy favors *binding* and *final* settlement agreements.

The strong policy underlying the enforceability of agreements not to litigate would be completely undermined if enforcement had to await the end of the very litigation sought to be avoided. Society's interest in settlement therefore counsels strongly in favor of allowing immediate appeal of decisions not to enforce settlement agreements. Allowing such appeals is fully consistent with the policies underlying the finality rule of 28 U.S.C. § 1291. Those policies include the avoidance of piecemeal litigation, efficient utilization of judicial resources, and prevention of delay in the ultimate disposition of a dispute. When the right sought to be vindicated on interlocutory appeal is the right not to be tried at all—rather than merely a defense on the merits or a claim to certain attributes of a trial—allowing appeal complements rather than conflicts with those policies. As the Second Circuit noted in *Janneh*, if interlocutory review were denied in such cases, the appellate courts would lose the "opportunity to review an order whose main effect is to keep alive litigation that arguably has been settled—thereby increasing the burden on the system as a whole." 887 F.2d at 433. The Tenth Circuit's rule will also encourage plaintiffs to seek to reopen settlement agreements more frequently, for they will sometimes regain the benefit of a litigation threat through erroneous district court decisions setting aside settlement agreements, decisions that will not be subject to review until the threat has served its purpose.

This case is a good example of the importance of permitting appeal under the collateral order doctrine of district court orders failing to enforce agreements not to litigate. The district court plainly applied the wrong legal standards in granting Desktop's motion to withdraw its notice of dismissal and rescind the Settlement Agreement. The district court granted the motion and reinstated the litigation because "a fact finder *could* determine that [Digital] failed to disclose material facts to plaintiff during settlement negotiations * * *." Pet. App. 13a (emphasis added). There is, however, no duty to disclose to an adversary during settlement negotiations. *See, e.g., Southwest E & T Suppliers, Inc.* v. *American Enka Corp.*, 463 F.2d 1165, 1166 (5th Cir. 1972); *Holman* v. *Gulf Refining Co.*, 76 F.2d 94, 98 (5th Cir.), *cert. denied*, 296 U.S. 590 (1935); *In re Appraisal of Enstar Corp.*, 593 A.2d 543, 549 (Del. Ch. 1991), *rev'd on other grounds*, 604 A.2d 404 (Del. 1992).

Even if there were such a duty, the Settlement Agreement should not have been set aside and the litigation reinstated on the basis of fraud simply because a fact finder "could" have found a failure to disclose. Given the importance of binding and final settlement agreements to the administration of justice, such agreements are not set aside on the basis of such speculation. *See supra*, at 22-26. In addition, a party seeking to set aside a settlement agreement on the basis of fraud must establish fraud through clear and convincing evidence, not simply meet the standard necessary to present the issue to a fact finder. *See Crookston* v. *Fire Ins. Exchange*, 817 P.2d 789, 800 (Utah 1991); Fed. R. Civ. P. 60(b)(3). Unless orders refusing to enforce agreements to forego litigation are appealable under the Court's collateral order doctrine, parties in Digital's situation will be compelled to endure the very burdens and expense of litigation they bargained to avoid, before being afforded the opportunity to secure appellate review of such plainly erroneous rulings of law. Under such a rule, the value of the settlement is signifi-

cantly diminished. This is particularly true when—as here—the plaintiff is allowed to keep the large sum paid in settlement in the meantime.

The Tenth Circuit seriously misjudged the importance of enforcing settlement agreements when it determined that immediate appeals of decisions refusing to enforce agreements not to litigate would serve no compelling public policy. The proper understanding of the public policy interests served by such appeals—grounded in the long-standing views of this Court and Congress—is demonstrated by the decisions of the Second, Fifth, and Eleventh Circuits. This Court should reverse the decision below to vindicate those interests.

2. *The Right To Appeal Under Section 1291 Should Not Be Circumscribed By A Court's Judgment About The Importance, As A Matter Of Public Policy, Of The Issue On Appeal*

While we think it clear that safeguarding the binding and final effect of agreements not to litigate meets the "compelling public policy" test set forth by the Tenth Circuit, Pet. App. 6a, it is important to recognize that this standard is nowhere articulated in this Court's opinions. Indeed, the entire enterprise engaged in by the court below—deciding which types of cases are "important enough" as a matter of public policy to be appealed under a statutory provision that does not vest such discretion in the courts—seems strangely foreign to accepted notions of jurisdiction and the respective roles of Congress and the Federal Courts. In fact, this Court's opinions confirm that the court below erred in undertaking to analyze whether this category of cases was "important enough," in some broad public policy sense, to be appealed under the *Cohen* doctrine.

The question of appealability turns, after all, on a construction of 28 U.S.C. § 1291. While this Court has given this statute a "practical rather than a technical construction," *Cohen*, 337 U.S. at 546, and allowed appeal of certain orders that do not completely terminate proceedings in the district court, the Court has from the beginning explained such decisions as being grounded on an interpretation of Section 1291. *See, e.g., Abney* v. *United States*, 431 U.S. at 659 n.4 (Court's decision in *Cohen* "was based on its construction of 28 U.S.C. § 1291"); *id.* at 662 (pretrial orders rejecting double jeopardy claims "satisfy the jurisdictional prerequisites of § 1291"); *United States* v. *MacDonald*, 435 U.S. at 854; *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 375. In determining which collateral orders may be appealed under *Cohen*, therefore, the Court is simply applying the statute enacted by Congress to govern jurisdiction in the federal courts.

The central concern of that statute is finality, and the question in any case applying the collateral order doctrine is whether the order at issue "is a final decision within the meaning of 28 U.S.C. § 1291." *Abney*, 431 U.S. at 653. The factors relied upon by this Court in answering that question—whether the ruling is conclusive, whether it is separate from the merits, and whether it is effectively unreviewable on appeal from a final judgment—are each logically related to finality. The question whether the right at issue is "important enough" in the broad public policy sense employed by the Tenth Circuit below, however, is not. The importance inquiry undertaken by the court below cannot be grounded in a construction of Section 1291.[12]

The *Cohen* doctrine is, admittedly, the result of what the Court termed a "practical" construction of Section 1291. But a recognition that the statutory term "final decisions" requires judicial construction does not mean that all bets are off and that the courts are free to shape

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[12] The First Circuit has concluded that importance "is not analytically a proper element of the collateral order test." *In re San Juan Star Co.*, 662 F.2d 108, 113 (1st Cir. 1991).

the jurisdictional provision as they see fit. It particularly does not mean that the courts are free to determine appealability based on their own notions of "importance," rather than factors tied in some way to the term to be construed—"final decisions." [13]

Appeals under the *Cohen* doctrine are appeals as of right under Section 1291. A doctrine that permits courts to determine the availability of such appeals on the basis of their own judgments about the importance of appealability would fly in the face of the traditional understanding that courts are bound to exercise the jurisdiction given to them by Congress. *See, e.g., Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"); *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1087 (1992) ("federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them" (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. at 817-818). *See also United States* v. *Weissberger*, 951 F.2d 392, 397 (D.C. Cir. 1991) ("If the matter in dispute satisfies the *Cohen* test, we must hear it").[14]

[13] The impropriety of the Tenth Circuit's approach is further confirmed by 28 U.S.C. § 2072(c). Enacted in 1990, that addition to the Rules Enabling Act authorizes this Court to prescribe, pursuant to the procedures of the Rules Enabling Act, rules defining "when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." The Court has not issued rules under this provision, but the statutory language confirms Congress's understanding that the focus should be—consistent with 28 U.S.C. § 1291—on defining when a ruling is "final," not simply when it should be "appealable" in the Court's view.

[14] Congress has vested discretion in the courts to authorize interlocutory appeals under 28 U.S.C. § 1292(b), based on a determination that the order in question "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Such action is of course quite different from the Tenth Circuit's approach here, be-

In *Cohen*, the Court of course observed that claims appealable on a collateral basis must be those that are "too important to be denied review." 337 U.S. at 546. *See also Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468 (to be appealable as collateral order, decision must "resolve an important issue completely separate from the merits of the action"). To be sure, some of the issues that this Court has found appealable under the *Cohen* test *do* involve issues of overarching public significance. *See, e.g., Nixon* v. *Fitzgerald*, 457 U.S. at 743 (appeal by former President Nixon of denial of absolute immunity presented "a 'serious and unsettled' and therefore appealable question" because of "special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers"). But this Court has never held that the "importance" element of the *Cohen* test gives federal courts license to determine that a claim otherwise appealable under the settled interpretation of Section 1291 should not be heard because the Court does not deem it important enough, as

cause it is based on an express congressional directive, and because it involves a specific determination in a particular case, not a broad policy judgment about whether whole classes of cases should be appealable.

Desktop is wrong to contend that Digital should not be permitted to appeal here because it did not seek leave to appeal under the entirely distinct, and discretionary, route of 28 U.S.C. § 1292(b). Opp. at 7. Desktop cites no authority—and we are aware of none—for the proposition that invocation of Section 1292(b) procedures is a prerequisite to an appeal under the collateral order doctrine. This Court, moreover, has permitted collateral review in cases where no certification was sought under Section 1292(b). *See, e.g., Abney* v. *United States*, 431 U.S. at 655. *See also Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979) (unsuccessful attempts to have issue of absolute immunity certified under Section 1292(b) did not preclude defendants from relying on collateral order doctrine), *cert. denied*, 453 U.S. 913 (1981); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.22[5], at 285 (1993) ("If an order that does not end the litigation fits within one of the practical finality doctrines, it is appealable as a final decision without the necessity of a § 1292(b) statement").

a matter of policy, to review prior to final judgment. The Tenth Circuit's effort to impose such a judicial public policy gloss on Section 1291 should be rejected.

In fact, this Court has *never* rejected collateral review—as the Tenth Circuit did below—simply because it deemed an issue that is conclusively determined, separate from the merits, and otherwise unreviewable to be not important enough for appeal as of right under Section 1291.[15] In *Coopers & Lybrand*, for example, the Court rejected the "death knell" doctrine for review of orders denying class certification, but did not rest its decision on any judgment of the importance of the matter as a matter of public policy. On the contrary, when the parties urged the Court to consider the importance of small-claim class actions, the Court expressly declined to do so: "Such policy arguments, though proper for legislative consideration, are irrelevant to the issue we must decide." 437 U.S. at 470.

The "importance" test embraced by the Tenth Circuit is largely indeterminate—precisely because it is a policy judgment more suited to legislative than judicial resolution. "Important enough" compared to what? By what standard does a court decide that allowing appeal of an order vacating attachment of a vessel or an order requiring the posting of security under state law is more important than allowing appeal of an order vacating a settlement? Such a standard promises widely disparate results across the various Circuits, for the simple reason that "importance" in this broad sense is a relative concept largely in the eye of the beholder. The Second Circuit, for example, may regard appeal of certain orders in securities cases to be "important enough," while the Tenth

[15] *See Boreri* v. *Fiat S.P.A.*, 763 F.2d 17, 21 (1st Cir. 1985); *In re San Juan Star Co.*, 662 F.2d at 113 (Supreme Court "has apparently never rejected an appeal for failure to satisfy" an importance test).

Circuit may regard review of certain orders in mining cases to fit the bill.

Such an imprecise test is peculiarly ill-suited for questions of federal court jurisdiction. To the extent possible, jurisdictional questions should be governed by clear lines. *See, e.g., Palmore* v. *United States*, 411 U.S. 389, 397 (1973) ("Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes'" (quoting *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968)). Permitting appellate jurisdiction to turn on a judicial evaluation of whether it is "important enough" as a matter of public policy to allow appeal of the type of issue involved plainly does not meet that standard and finds no support in the jurisdictional statute at issue.[16]

[16] The Tenth Circuit based its approach on a separate concurring opinion in which, according to the Tenth Circuit, one Justice "found the importance requirement dispositive." Pet. App. 7a (citing *Lauro Lines*, 490 U.S. at 502 (Scalia, J., concurring)). Even that separate concurrence did not adopt a "compelling public policy" test of the sort applied by the court of appeals below, but the important point is that the opinion was a separate concurrence, joined by no other member of the Court. If this Court understood its practical construction of Section 1291 to allow it to decide which matters otherwise satisfying the collateral order doctrine were "important enough" to appeal, presumably the majority would have said so in response to the concurrence's invitation. In fact, what the Court did in its unanimous opinion (the author of the concurrence also joined the opinion) was focus on "the precise contours of the right asserted," and conclude that what was at issue was *not* a right to avoid suit. 490 U.S. at 501. That inquiry—not some vague assessment of importance—is the critical one.

Indeed, under the analysis in the concurring opinion in *Lauro Lines*, *Cohen* itself was wrongly decided. The concurrence concluded that the right under the contractual forum selection clause was not important enough to justify interlocutory appeal. The author of the concurrence, however, had earlier explained that "[i]t is difficult to imagine an issue of more importance, other than one that goes to the very merits of the lawsuit, than the validity of a contractual forum-selection provision," specifically citing the issue in *Cohen* in

The Tenth Circuit therefore erred not only in its conclusion that vindication of the finality of settlement agreements does not serve "compelling public policy" interests, but also in its very decision to search for and evaluate such interests. Since the inquiry under *Cohen* is an interpretation of Section 1291, the content of any importance test must relate to that provision, not to broad notions of public policy. Although this Court has not been required in the nearly 45 years since *Cohen* to define the precise scope of the importance inquiry, a right to avoid trial is plainly "important" under Section 1291, since that provision is concerned solely with whether trial must proceed or an appeal may be taken. Indeed, as explained above, this Court's recent decisions have emphasized that "an entitlement not to stand trial" is "the heart of the issue," *Mitchell* v. *Forsyth*, 472 U.S. at 525, and the Court has *always* found collateral review permissible after satisfying itself that a right not to be tried was implicated. Once Digital established the existence of such a right, the importance test—whatever its precise boundaries—was necessarily met.

3. *There Is No Basis In Section 1291, Or In The Decisions Of This Court, For Limiting Appeals Under The Statute To Those Invoking Constitutional Or Statutory Rights*

In addressing the importance issue, the court below quoted this Court's opinion in *Midland Asphalt* for the proposition that the right not to be tried under *Cohen* "rests upon *an explicit statutory or constitutional guarantee* that trial will not occur." Pet. App. 9a (quoting 489 U.S. at 801) (emphasis added by court below)). The Court in *Midland Asphalt* did cite cases that permitted interlocutory appeals under *Cohen* where the right not to be tried rested on explicit constitutional guarantees that trial will not occur. As the Tenth Circuit itself noted, however, this Court has not so limited the application of the collateral order doctrine. Pet. App. 6a, 8a. The Tenth Circuit cited, for example, this Court's decision in *Mitchell* v. *Forsyth, supra,* in which the Court found the denial of qualified immunity to be immediately appealable under *Cohen.* The right not to be tried based on a defense of qualified immunity plainly does not rest upon "an explicit statutory or constitutional guarantee that trial will not occur." Nor does the right not to be tried based on absolute immunity, which this Court has also held will give rise to an immediate appeal under *Cohen. Nixon* v. *Fitzgerald,* 457 U.S. 731 (1982). Rather, the immunity doctrines articulated by this Court have been developed by "[d]rawing upon principles of immunity developed in English cases at common law." *Id.* at 744. *See Anderson* v. *Creighton,* 483 U.S. 635, 644 (1987) ("our determinations as to the scope of official immunity are made in the light of the 'common-law tradition' ").[17]

Here Digital's right not to be tried rests on the plain terms of the Settlement Agreement, and Digital's common law right to enforce that contract with Desktop. Neither the Tenth Circuit below nor respondent has offered any reason why such a right grounded in state common law should be any less supportive of immediate appeal under *Cohen* than the state statutory right at issue in *Cohen* itself, the common law rights not to be tried at issue in

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a list of issues "of similar or obviously lesser importance." *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 40-41 (1988) (Scalia, J., dissenting). If the issue in *Lauro Lines* was not important enough, according to this reasoning, then the issue in *Cohen* was not either. The cases are reconciled by recognizing that *Lauro Lines* was not based, implicitly or otherwise, on the importance of the right asserted, but on careful scrutiny of whether the right was in fact a right to avoid trial.

[17] A similar conclusion was reached by the Ninth Circuit in *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991), in which the court held that denial of the judicially-created *Feres* defense (*see Feres* v. *United States*, 340 U.S. 135 (1950))—which also involved no explicit statutory or constitutional guarantee that trial will not occur—was immediately appealable under *Cohen.*

the immunity cases, or the attachment rights based on admiralty practice that were at issue in *Swift & Co.* v. *Compania Columbiana del Caribe,* 339 U.S. 684 (1950) (allowing immediate appeal of district court order vacating attachment of vessel). In fact, this Court has never held *Cohen* inapplicable because the asserted right was based on enforceable law other than the Constitution or a statute. In *Lauro Lines,* for example—decided after *Midland Asphalt*—the Court considered the appealability of an order refusing to enforce a contractual forum selection clause under the normal criteria for applying the collateral order doctrine. If the *Midland Asphalt* language were taken literally, however, the issue would have been resolved merely by observing that no explicit constitutional or statutory rights were at stake. Instead, the Court applied the normal *Cohen* analysis and decided that the case did not involve an entitlement "to avoid suit altogether." 490 U.S. at 501. This case plainly does. *See supra* at 12-15.

Nothing in the language or history of Section 1291, moreover, suggests that the collateral order doctrine should be limited to cases involving explicit constitutional or statutory rights not to go to trial. As explained above, this Court's decisions make plain that the *Cohen* doctrine is grounded in a construction of the term "final decisions" in the statute. The test articulated by the Court identifies those decisions that bear the characteristics of finality: conclusively determined by the district court, not bound up in the merits of the continuing dispute, and effectively lost if not vindicated on an interlocutory basis. An additional element of the test requiring an explicit constitutional or statutory source for the asserted right completely divorces the test from its statutory basis. Nothing in the language of Section 1291 provides any support for a limitation of appeals to certain types of decisions otherwise considered to be final under the statute.

Nor are the purposes of the finality rule served by limiting appeals under the collateral order doctrine to those

cases involving explicit constitutional or statutory rights not to be tried. The finality rule, this Court has explained, is designed "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Cohen,* 337 U.S. at 546. The Court has subsequently explained that the rule serves the interests of deference to the independence of trial judges, avoiding obstruction of just claims, and efficient judicial administration. *Richardson-Merrell, Inc.* v. *Koller,* 472 U.S. 424, 430 (1985); *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U.S. at 374. But, as the *Cohen* doctrine recognizes, sometimes these interests are better served by permitting collateral appeals. *See, e.g., Coopers & Lybrand,* 437 U.S. at 471 ("a rigid insistence on technical finality would sometimes conflict with the purposes of the statute"); *Cobbledick* v. *United States,* 309 U.S. at 329 ("Due regard for efficiency of litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes"). Neither the interests served by the finality rule nor the reasoning underlying the *Cohen* doctrine suggest any meaningful way in which the *source* of the right at issue (*e.g.,* constitutional, statutory, common law, or private agreement) has any bearing on the purposes served by the rule or the interpretation of it adopted in *Cohen.*[18]

* * * *

[18] The Court in *Midland Asphalt* was not asked to limit the instances in which a right not to be tried would give rise to immediate appeal under *Cohen* to those cases in which the right was grounded in an explicit constitutional or statutory provision; no such issue was before the Court. The point of the sentence taken out of context by the Tenth Circuit had nothing whatever to do with the *source* of the right not to be tried, but rather with the fact that, for *Cohen* purposes, the guarantee must be—as it is in this case—that "trial will not occur." Indeed, when this Court had occasion to quote the same sentence from *Midland Asphalt* in its opinion in *Lauro Lines,* the Court underscored the phrase "that trial will not occur," not the *obiter dicta* underscored by the Tenth Circuit. *Compare* 490 U.S. at 499 (quoting *Midland Asphalt*) *with* Pet. App. 9a (same).

The right Digital seeks to vindicate on appeal is the right to avoid trial, and that right will be lost if Digital must await the end of trial to appeal. Under this Court's precedents, a conclusive determination of a claim to avoid trial separate from the merits is immediately appealable under the *Cohen* doctrine. The court of appeals erred in reaching the contrary result, based on its determination as a matter of public policy that the right to avoid trial at issue here—one based on a settlement agreement typical of the sorts of agreements that play a key role in dispute resolution in the federal courts—was not important enough to support appeal under *Cohen*. This Court accordingly should reverse the judgment below.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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